TAN KEAT SENG KITSON

v.

KERAJAAN MALAYSIA

HIGH COURT MALAYA, JOHOR BAHRU
DATO' ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO. 24-225 OF 1995]
9 DECEMBER 1995

CONSTITUTIONAL LAW: *Citizenship - Application for declaration that plaintiff is a Malaysian citizen - Application for declaration that Ministry of Home Affairs, Malaysia could take action against plaintiff if he acts inconsistently with his citizenship status - Application for declaration that plaintiff is not obliged to register for national service in Republic of Singapore - Whether Court should grant declarations.*

CONSTITUTIONAL LAW: *Courts - Jurisdiction of High Court - Courts of Judicature Act 1964, s. 23 - Whether Court has jurisdiction to make declarations pertaining to laws of Republic of Singapore.*

CONTITUTIONAL LAW: *Citizenship - Dual citizenship - Whether Malaysian who also holds Singapore citizenship has to perform national service in Republic of Singapore - Whether Court will make declaration on status of citizenship.*

CIVIL PROCEDURE: *Declaration - Application for - Whether plaintiff has cause of action - Cause of action arose in Republic of Singapore - Whether plaintiff adversely affected or prejudiced by action of defendant - Factual situation – Applicability of Rules of the High Court 1980, O. 15 r. 16.*

CIVIL PROCEDURE: *Striking out - Rules of the High Court 1980, O. 18 r. 19 - Principles applicable - Whether obviously unsustainable - Whether there is reasonable cause of action.*

ADMINISTRATIVE LAW: *Remedies - Declaration - When will Court grant declarations - Discretionary powers - Common law principles.*

This was an application by the plaintiff by way of originating summons for the following declarations: (1) that the plaintiff is a citizen of Malaysia; (2) that as a loyal citizen of Malaysia, any act which is inconsistent with such loyalty, the Ministry of Home Affairs, Malaysia (the defendant) could take appropriate action against such act of disloyalty leading to the deprivation of the Malaysian citizenship; and (3) that the plaintiff is not obliged to register for the national service of the Republic of Singapore (Singapore) when he is and remains a citizen of Malaysia, and that any such act would be inconsistent with his Malaysian citizenship status.

The plaintiff was born in Singapore in 1974. His father is a Malaysian citizen while his mother is a Singapore citizen. The plaintiff holds a Singapore identity card and a Singapore restricted passport but later acquired a Malaysian identity card and a Malaysian passport. On a number of occasions, the plaintiff had written to the Registrar of Citizens, Singapore (the RCS) and the Ministry of Defence, Singapore (the MDS), expressing his intention to renounce his Singapore citizenship which he had acquired by virtue of his mother being a Singapore citizen. Both the RCS and the MDS took the stand that the plaintiff could only renounce his Singapore citizenship upon reaching 21 years of age as per Art. 128(1) and (2) of the Constitution of Republic of Singapore, and that in the interim, the plaintiff has to register for the national service of Singapore. The MDS stated that "the acquiring of foreign citizenship does not absolve the plaintiff from the liabilities under the Enlistment Act 1992 [Sing]," and that the plaintiff is now a national service defaulter. The plaintiff maintained that he had not acquired a foreign citizenship (ie, his Malaysian citizenship), but was and is, by birth (by virtue of his father being a Malaysian citizen), and by operation of Malaysian law, a citizen of Malaysia.

Subsequently, the plaintiff wrote to the defendant seeking a clarification on the stand taken by the MDS and the RCS. The defendant replied to the effect that the plaintiff is also a Singapore citizen by virtue of his mother's Singapore citizenship. The plaintiff argued that the defendant had failed to direct its mind and give a clear direction on the issues of his dual citizenship and the mandatory requirement of the MDS that he registers himself for the national service of Singapore. It was the plaintiff's contention that, as a Malaysian citizen, his registration for national service in Singapore could be construed as a disloyal act inconsistent with his allegiance to Malaysia. Hence, the plaintiff sought the Court's indulgence to make a declaration on the status of his citizenship so that he could live peacefully and without fear.

On these set of facts, the defendant (originally the Ministry of Home Affairs, Malaysia but substituted by Kerajaan Malaysia through an *ex parte* application) filed a summons in chambers to strike out the plaintiff's application under O. 18 r. 19 of the Rules of the High Court 1980 (the RHC).

Held:

[1] The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases, when it can clearly be seen that the claim is, on the face of it, obviously unsustainable, that recourse should be had to the summary process under O. 18 r. 19 of the RHC.

[2] On an application to strike out a statement of claim and dismiss the action, the right course for the Court is to strike out the claim if it is satisfied that the claim does not disclose a reasonable cause of action, ie, a cause of action with some chance of success where only the allegations in the pleadings are considered.

[3] A cause of action is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in one way or another, been adversely affected or prejudiced by the act of a defendant in an action. Therefore, a cause of action is a factual situation, the existence of which entitles one person to obtain from the Court a remedy against another person.

[4] In respect of the plaintiff's first prayer, there was no necessity for the Court to declare the plaintiff a Malaysian citizen as he is already recognised as such by the defendant. The defendant has made it known to the world at large that the plaintiff is a Malaysian citizen. The plaintiff's Malaysian identity card and Malaysian passport have already given finality to his status as a citizen of Malaysia. Consequently, as the relief sought by the plaintiff in this prayer has already been accorded to him by the defendant, there was no subsisting cause of action against the defendant in this respect.

[5] The situations which led the plaintiff to seek relief as per the second and third declarations were not created by the defendant. The authors of these possible causes of action were the RCS and the MDS. It was the MDS which took the stand that the plaintiff's Malaysian citizenship does not absolve him from national service duties in Singapore. It was the MDS which requires the plaintiff to perform national service, and upon his failure to do so, listed him as a national service defaulter. The defendant was not involved at all. There was absolutely no evidence of any 'factual situation' created by the defendant which adversely affected or prejudiced the plaintiff's rights, either at law or by statute. Hence, the plaintiff's claim was obviously unsustainable and there was no cause of action available to him as against the defendant. The plaintiff's cause of action should lie in Singapore and not in Malaysia.

[6] The general civil jurisdiction of the High Court is clearly set out in s. 23 of the Courts of Judicature Act 1964. It is beyond peradventure that the High Court has no jurisdiction to adjudicate on matters pertaining to the Constitution of Republic of Singapore or the Enlistment Act 1992 [Sing]. The Court has no jurisdiction to make the declarations sought by the plaintiff as the cause of action arose in a foreign country.

[7] Order 15 r. 16 of the RHC which states that the Courts may make binding declarations of right whether or not consequential relief is or could be claimed, was of no help to the plaintiff as the defendant had not created any 'factual situation' which adversely affected or prejudiced the plaintiff.

[Defendant's application to strike out allowed. Plaintiff's application dismissed with costs]

Cases referred to:

Sim Kie Chon v. Superintendent of Pudu Prison & Ors. [1985] 2 CLJ 268; [1985] 2 MLJ 385 SC ***(refd)***

Lim Kit Siang v. Pemangku Ketua Polis Daerah, Butterworth & Ors. [1988] 2 MLJ 648 ***(foll)***

Government of Malaysia v. Lim Kit Siang [1988] 1 CLJ 219; [1988] 2 MLJ 12 SC ***(foll)***

Attorney General Duchy of Lancaster v. L. & N.W. Railway Co. ***(foll)***

Pegang Mining Co. Ltd. v. Chong Sam & Ors. [1969] 2 MLJ 52 ***(foll)***

Letang v. Cooper [1965] 1 QB 232 ***(foll)***

Punton v. Ministry of Pensions And National Insurance [1963] 1 WLR 186 ***(refd)***

Barnard & Ors. v. National Dock Labour Board & Ors. [1953] 2 QB 18 ***(refd)***

Francis v. Yiewsley and West Drayton Urban District Council [1957] 2 QB 136 ***(refd)***

Vine v. National Dock Labour Board [1957] AC 488 ***(refd)***

Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government & Ors. [1960] AC 260 ***(refd)***

Gibson v. Union of Shop, Distributive and Allied Workers [1968] 1 WLR 1187 ***(dist)***

Dyson v. Attorney-General [1912] 1 Ch. 158 ***(dist)***

Burghes v. Attorney-General [1912] 1 Ch. 173 ***(dist)***

Guaranty Trust Co. of New York v. Hannay & Co. [1914-15] All ER Rep. 24 CA ***(refd)***

Buck & Ors. v. Attorney-General [1965] 1 All ER 882 CA ***(foll)***

Union Insurance Malaysia Sdn. Bhd. v. Chan You Young [1995] 4 CLJ 92 ***(refd)***

Legislation referred to:

Constitution of the Republic of Singapore, Article 128(1) & (2)
Courts of Judicature Act 1964, s. 23
National Registration Regulations 1990 (Singapore), r. 5(3)(a)
Rules of the High Court 1980, O. 15 r. 16, O. 18 r. 19
Rules of the Supreme Court, O. 25 r. 4
Enlistment Act (Chapter 93) (Singapore), Revised Edition 1992

For the plaintiff - K. Sila Dass; K. Sila Dass & Partners
For the defendant - Azman Abdullah SFC

JUDGMENT

Abdul Malik Ishak J:

Initially the plaintiff cited the Ministry of Home Affairs, Malaysia as the defendant in this originating summons but by an *ex-parte* application (encl. 6) which was supported by an affidavit (encl. 5), the Government of Malaysia was substituted as the defendant and an order to that effect was made on 20 September 1995.

This was an application by the plaintiff as per the amended originating summons in encl. 11 (the previous encl. 3) supported by an amended affidavit as per encl. 12 (the previous encl. 2) for the following prayers:

(a) a declaration that the plaintiff is a citizen of Malaysia;

(b) a declaration that as a loyal citizen of Malaysia any act which is inconsistent with such loyalty the Ministry of Home Affairs could take appropriate action against such act of disloyalty leading to the deprivation of the Malaysian citizenship;

(c) a declaration that the plaintiff is not obliged to register for the national service of the Republic of Singapore when he is and remains a citizen of Malaysia and any such act will be inconsistent with his Malaysian citizenship status.

The facts as gathered from the affidavit in encls. 12 and 2 (the contents thereof were identical to one another) were as follows:

The plaintiff was born in Singapore on 17 December 1974. The plaintiff's natural father is Tan Boon Kiat who is a Malaysian citizen while his natural mother is Hing Ah Lek (f) who is a Singapore citizen.

The plaintiff deposed in both the affidavits that his father, at all material times, had his business in Johor Bahru and, consequently, the plaintiff deposed that his father's matrimonial house was and still is at Johor Bahru. The plaintiff too deposed, and this must be an attempt at bolstering the facts in favour of the plaintiff, to the effect that his brother, sister and himself had lived in Johor Bahru although they attended schools in Singapore. I shall revert to this piece of evidence later in the course of the judgment. It was said that when the plaintiff was about 15 years of age, his mother had approached the citizenship department of Singapore and conveyed the message that he is a Malaysian citizen by virtue of the fact that his father is a Malaysian citizen and that he wishes to renounce his Singapore's citizenship which he had acquired through his mother. The mother was advised that the plaintiff could only renounce his Singapore citizenship upon attaining the age of 18 as the law of Singapore stood at that point of time. It was said that the Singapore Government had since amended the law to the effect that a citizen of Singapore could, *inter alia*, renounce his Singapore citizenship only upon attaining the age of 21. It was said that the plaintiff is now a Malaysian citizen and has been issued with a Malaysia identity card No. A 3905688 and a Malaysian Passport No. A 5838497. However, when the plaintiff was young his mother had secured for him a Singapore Restricted Passport No. S 7441659 D and a Singapore identity card. The plaintiff has since stopped schooling in Singapore and currently pursuing further studies in the United Kingdom. It was deposed that on or about 26 April 1992, the plaintiff's father wrote to the Singapore's Registrar of Citizens to the effect that since the plaintiff is a Malaysian citizen he would like to renounce his Singapore's citizenship. The Singapore's Registrar of Citizens replied that the plaintiff could only do so when he attains the age of 21. It was said that on or about 11 August 1992, the plaintiff's father had instructed his solicitors Messrs K. Sila Dass & Partners, to convey certain messages by letter to the Singapore's Registrar of Citizens to the effect that:

(i) the plaintiff is a Malaysian citizen by operation of law;

(ii) on attaining the age of 18 years old, the plaintiff has to take the oath of allegiance to the Yang di Pertuan Agong and Malaysia;

(iii) the plaintiff has decided to remain as a Malaysian citizen;

(iv) the plaintiff has no intention to remain or re-affirm or to become a Singapore citizen; and

(v) being a minor the plaintiff has to follow his father's domicile and citizenship status.

A copy of that very letter was produced and marked as Exh. "TKSK1". It must be pointed out that the letter "TKSK1" was addressed to the Ministry of Defence, Central Manpower Base, Depot Road Camp, Depot Road, Singapore 0410 and not to the Singapore's Registrar of Citizens as alleged. The plaintiff confirmed and adopted all that was stated in that letter particularly:

(1) as a citizen of Malaysia, his allegiance and loyalty is to Malaysia and to no other country.

(2) that he has no intention of becoming a citizen of Singapore nor does he wish to re-affirm or adopt the citizenship of Singapore which he has seemingly acquired through his mother's status as a citizen of Singapore.

However, the reply came from the Singapore's Registrar of Citizens by letter dated 16 September 1992 (Exh. "TKSK2") wherein it was stated that by virtue of Articles 128(1) and 128(2) of the Constitution of the Republic of Singapore, the plaintiff could not as yet renounce his citizenship status because of his age.

It was deposed by the plaintiff that he was requested to submit forms to register himself for national service in Singapore. The plaintiff consulted his solicitors, who, on being appraised of the facts, were of the opinion (as deposed by the plaintiff) that:

(i) as a Malaysian citizen, the plaintiff's registration for national service in Singapore could be construed as an act inconsistent with the plaintiff's allegiance to Malaysia;

(ii) as a Malaysian citizen, the plaintiff's registration for national service in Singapore could be construed as a disloyal act towards Malaysia;

(iii) notwithstanding the fact that the plaintiff's mother is a citizen of Singapore, by right the plaintiff has to follow his father's citizenship and domicil and that the plaintiff could not possess any other citizenship status which is inconsistent with that of his father.

It was deposed that by letter dated 28 January 1994, the plaintiff's solicitors wrote to the Singapore's Immigration Department surrendering the plaintiff's Singapore's Restricted Passport No. S 7441659 D as the plaintiff is a Malaysian citizen (Exh. "TKSK3"). The Singapore's Immigration Department by letter dated 8 March 1994 acknowledged receipt of that document (Exh. "TKSK4"). By letter dated 3 March 1994, the Singapore's Ministry of Defence wrote to the plaintiff's solicitors (Exh. "TKSK5") and in that letter it was stated that the plaintiff and his brother, according to their records, were Singapore citizens and were liable for national service. That letter also stated that the "**acquiring of foreign citizenship does not absolve them from the liabilities under the Enlistment Act**." That letter also stated that the plaintiff and his brother were listed as national service defaulters liable to be visited with imprisonment or fine or both. By letter dated 9 March 1994 (Exh. "TKSK6"), the plaintiff's solicitors replied to the letter dated 3 March 1994 (Exh. "TKSK5") and sought to correct the error. The letter dated 9 March 1994 (Exh. "TKSK6") was worded thus:

> It is not correct that both our clients, Kitson and Jason acquired foreign citizenship instead they were by birth and operation of law citizens of Malaysia by virtue of the fact that their father, Tan Boon Kiat was, and is, a Malaysian citizen.
>
> In the circumstances would it be proper to insist that a Malaysian citizen should report for national service.
>
> Please also note that this problem had been raised with the Ministry of Home Affairs, Malaysia.
>
> Yours faithfully,
>
> Sgd (illegible)
>
> c.c. client.

This letter too contains an untruth of which I shall have something to say at a later stage.

Again by letter dated 21 April 1993, the plaintiff's solicitors wrote to the Minister of Home Affairs Malaysia (Exh. "TKSK7") and in that letter all the facts were presented therein and it sought to seek clarification on the stand taken by the Singapore's Ministry of Defence. There was, however, a slight error on the last sentence of the second paragraph of the letter in Exh. "TKSK7" and it was rectified by letter dated 25 June 1993 (Exh. "TKSK8") where it adverted to the fact that the client's two children were Malaysian citizens and not permanent residents of Malaysia. It was deposed that the Malaysian Ministry of Home Affairs responded and by letter dated 22 June 1993 (Exh. "TKSK9") merely addressed the issue of the citizenship of the plaintiff's mother without looking at the entire circumstances of the case. It was said that the reply was most unsatisfactory. It was deposed that the

Ministry of Home Affairs, Malaysia by letter dated 19 July 1993 (this letter was not exhibited) again reiterated that following the plaintiff's mother's citizenship status, the plaintiff was said to be a Singapore citizen. Consequently, the plaintiff deposed that the replies from the Ministry of Home Affairs Malaysia did not touch on the following pertinent questions:

(1) What would the plaintiff's actual position be both as a Malaysian citizen by operation of law and as a Singapore citizen by reason of the fact that his mother is a Singapore citizen but at the same time a permanent resident of Malaysia, and in this context the plaintiff has decided not to be a Singapore citizen?

(2) According to the Malaysian age of majority the plaintiff will no longer be a minor upon attaining the age of 18 years old, and this entitles him to act independently - in the circumstances, is the plaintiff still bound by his mother's citizenship status since the plaintiff has acquired his own citizenship by operation of law and have pledged allegiance to Malaysia?

(3) As a Malaysian citizen would it be proper for the plaintiff to enlist for national service in a foreign country with which the plaintiff have no relationship nor do the plaintiff owe any loyalty?

The plaintiff deposed further that he was advised and verily believed that the Ministry of Home Affairs, Malaysia had not directed its mind to the question postulated above and that these are not hypothetical questions but real and have emerged in the plaintiff's case. It was deposed that in the meantime the plaintiff's mother made representations to a member of Parliament in Singapore in regard to the plaintiff's predicament. That member of Parliament in Singapore did not reply but instead the matter was referred to the Singapore's Registry of Citizens who, on 1 January 1994, wrote a letter to the plaintiff's mother (Exh. "TKSK10"). However, it was deposed that nothing significant turned out from the said letter. It transpired that that letter merely repeated that the plaintiff could renounce his Singapore's citizenship upon attaining the age of 21 years and, in the meantime, the plaintiff has to register himself for national service. It was deposed that on the question of the plaintiff registering himself for national service in Singapore, that submission, so the plaintiff was advised, could be construed as an act inconsistent with his allegiance to Malaysia. The plaintiff was further advised and he verily believed that any act or conduct inconsistent with his obligations stemming from being a Malaysian citizen would be viewed with suspicion and his loyalty to Malaysia doubted. The plaintiff deposed that he was also advised and he verily believed that he should not do anything which may be construed as an act of disloyalty to Malaysia and the acts of registering for national service and applying for exemption thereof may not be consistent with the plaintiff's status as a Malaysian citizen. The plaintiff further deposed that he was advised and verily believed that the intention of the Singapore Government lacks *bona fide* in

the sense that by requiring the plaintiff, a Malaysian citizen, to register at the age of 16 for national service while the plaintiff is still a minor puts the plaintiff in a predicament because when the plaintiff attains the age of 18 years old he has to take the oath of allegiance to Malaysia. It was deposed that by registering for national service in Singapore and on the assumption that the plaintiff had gone through the national service exercise, then the plaintiff's chances of becoming a Malaysian citizen would be jeopardised. It was deposed that the Singapore Government enacted the laws the way it did simply to place persons like the plaintiff in a predicament in that:

(1) by compelling the plaintiff to register and do national service in Singapore at a young age would influence the plaintiff to remain a Singapore citizen, sing Singapore's national anthem, pledge his allegiance to Singapore; and

(2) when the plaintiff reaches the age of majority and pledges his allegiance to Malaysia, such pledge may be doubted because of the plaintiff's earlier pledge to Singapore.

The plaintiff further deposed that he was advised to say that although the Singapore Government has the power to increase the age when its citizen could renounce its citizenship, it did not take into consideration persons like the plaintiff who for all intents and purposes are Malaysian citizens. In this context, it was deposed that the Singapore Government had not acted in complete good faith. The plaintiff deposed that as a Malaysian citizen and holding a valid Malaysian passport he is afraid to travel to Singapore because the Singapore authorities may arrest him on sight and charge him for an offence under their laws. Consequently, the plaintiff was advised to say that as a Malaysian citizen he should not be subjected to such a predicament. Finally, it was deposed that since the Ministry of Home Affairs, Malaysia has not given a clear direction on the issue of dual citizenship and mandatory requirement by the Singapore government that the plaintiff should register himself for national service in Singapore notwithstanding the plaintiff's Malaysian status, the plaintiff now seeks this Court's indulgence to declare his status so that he can live peacefully and without fear.

On these set of facts, the defendant filed a summons in chambers (encl. 10) to strike out the originating summons (encls. 11 and 3) as it did not disclose a cause of action under O. 18 r. 19 of the Rules of the High Court 1980 ("RHC").

This judgment is all encompassing as it covers not only encl. 10 but also encls. 11 and 3.

On the principles to follow in regard to O. 18 r. 19 of the RHC, I am reminded of what Abdul Hamid CJ (Malaya) (as he then was) said in *Sim Kie Chon v. Superintendent of Pudu Prison & Ors.* [1985] 2 MLJ 385 SC, particularly at p. 386:

> The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases that recourse should be had to the summary process under O. 18 r. 19 of the Rules of the High Court 1980: "the summary procedure under this rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'." (*Attorney - General Duchy of Lancaster v. L & NW Railway Co.* [1892] 3 Ch 274) (Supreme Court Practice 1985).
>
> On an application to strike out the statement of claim and dismiss the action, the right course for the Court is to strike out the claim if it is satisfied that a claim does not disclose a reasonable cause of action.

As to the meaning of "a reasonable cause of action", Edgar Joseph Jr J (now FCJ) described it in *Lim Kit Siang v. Pemangku Ketua Polis Daerah, Butterworth & Ors.* [1988] 2 MLJ 648 in this fashion:

> A reasonable cause of action therefore means a cause of action with some chance of success where only the allegations in the pleading are considered (per Lord Pearson in *Drummond Jackson v. British Medical Association* [1970] 1 WLR 688).

Salleh Abas LP (as he then was) in *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12 SC especially at p. 19 in trenchant terms spoke of the meaning to the words "**a cause of action**". This was what his Lordship said:

> What then is the meaning of 'a cause of action'? 'A cause of action' is a statement of facts alleging that a plaintiff's right, either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of a defendant in an action. Lord Diplock in *Letang v. Cooper* [1965] 1 QB 232, at p. 242 defined 'a cause of action' to mean 'a factual situation, the existence of which entitles one person to obtain from the Court a remedy against another person'. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that, secondly, such right has been affected or prejudicated by the appellant/defendant's act.

Now, with these principles in the forefront of my mind, I shall proceed to consider the submissions of both parties. Mr. Azman Abdullah, the learned Senior Federal Counsel for the defendant, argued systematically to the effect that the prayers sought for (encls. 11 and 3) did not disclose a cause of action. He submitted that there is no necessity to declare the plaintiff as a citizen of Malaysia as he is already recognised as such by the defendant. The plaintiff possessed a Malaysian identity card bearing no. A 3905688 and a Malaysian passport bearing no. A 5838497. These documents (shown to this Court and agreed upon as correct by the plaintiff's Counsel) gave finality to the status of the plaintiff as a Malaysian citizen. Rule 5(3)(a) of the National Registration Regulations 1990 specifically states that:

5(3) Ketua Pengarah hendaklah menyebabkan di masukkan di dalam sesuatu kad pengenalan:

(a) dalam hal seseorang yang menjadi warganegara malaysia, perkataan "**Warganegara**' di cetak pada kad pengenalan itu.

and this has been complied by the Director-General. A perusal of the plaintiff's Malaysian identity card as adverted to above would bear this out. In fact, even the Malaysian passport of the plaintiff bore the now famous legend "**Citizen of Malaysia**" in bold print. Mr. Azman Abdullah submitted that to date the Malaysian Government did not challenge the status of the plaintiff as a Malaysian citizen. He submitted that the Malaysian Government did not intend to nor exhibit any intention nor desire to withdraw the status of the plaintiff as a Malaysian citizen at any point of time. For these reasons, it was submitted that the relief sought for in prayer (a) of encls. 11 and 3 was already accorded to the plaintiff and, consequently, there was no subsisting cause of action against the defendant. Indeed this was a cogent piece of submission advanced by the learned Senior Federal Counsel.

Next, it was argued that prayers (b) and (c) of encls. 11 and 3 were causes of action that was not created by the defendant. The authors of these causes of action were none other than the Government of Singapore. The words employed in prayer (b) "... any act which is inconsistent with such loyalty the Ministry of Home Affairs could take appropriate action against such act of disloyalty leading to the deprivation of the Malaysian citizenship" were said to be mere words devoid of substantial or any proof. Mr. Azman Abdullah reiterated the stand of the Malaysian Government in that there was no intention to revoke the citizenship status of the plaintiff nor were there plans to reconsider the plaintiff's status as a Malaysian citizen. Clearly, therefore, it was the stand of the defendant that in so far as prayer (b) was concerned it was too premature for the plaintiff to speculate because the cause of action has yet to arise.

In regard to prayer (c), it was rightly submitted that there was no cause of action in existence between the plaintiff and the defendant. The cause of action in so far as the question of registering for national service in the Republic of Singapore is concerned was entirely an affair between the plaintiff and the Republic of Singapore - in particular the Singapore's Ministry of Defence, Central Manpower Base, CMPD Podium, Depot Road, Singapore 0410. The letter from the Singapore's Ministry of Defence dated 3 March 1994 as reflected in Exh. "TKSK5" which is addressed to the plaintiff's solicitors reads as follows:

Dear Sirs,

National Service Liabilities

(a) Name: **Tan Keat Seng Kitson (NRIC: 7441659D & DOB: 17 December 1974)**
(b) Name: **Tan Teck Seng Jason (NRIC: 7615418Z & DOB: 6 May 1976)**

1. Please refer to your letter KSD/2M/BP/4861/92-D of 28 January 1994.

2. According to the records in the Registrar of Citizens, both your clients, Kitson and Jason are Singapore citizens. We wish to inform you that as long as Kitson and Jason are Singapore citizens, they are liable for National Service. The acquiring of foreign citizenship does not absolve them from the liabilities under the Enlistment Act.

3. Kitson and Jason have failed to obtain an Exit Permit to remain overseas and also failed to report for pre-enlistment/medical examination as required in May 1992 and October 1993 respectively. They are therefore listed as National Service defaulters.

4. For your information, a National Service defaulter is liable on conviction to imprisonment for a term not exceeding three years or to a fine not exceeding five thousand dollars or to both such imprisonment and fine.

Your faithfully,

Sgd

Mrs. Fong Ai Choo
for Commander.

The letter as reproduced above is clearly self explanatory. It is the Singapore Government that requires the plaintiff as a Singapore citizen to be conscripted in the army to perform his national service. It is the Singapore Government's stand that the plaintiff's acquisition of foreign citizenship does not absolve him from liability under the Singapore Enlistment Act. It is the Singapore Government's stand that the plaintiff has failed to obtain an exit permit to remain overseas and also has failed to report for pre-enlistment/medical examination. It is the Singapore Government's stand that the plaintiff should be branded as a national service defaulter who, on conviction, would be liable to imprisonment for a term not exceeding three years or to a fine not exceeding five thousand dollars or to both such imprisonment and fine. Clearly that was a love hate affair between the plaintiff and the Singapore Government. The Malaysian Government is not involved at all. The Malaysian government did not, at any time, issue a directive to the plaintiff for him to go to Singapore and perform his national service there even though the Singapore Government has branded the plaintiff as a national service defaulter. The Malaysian Government too, so submitted Mr. Azman Abdullah, did not question the plaintiff's loyalty to Malaysia. The plaintiff was accorded the same privileges

like other Malaysians - he has the right to travel abroad and to return to Malaysia unhindered. For these reasons, it was rightly submitted that the plaintiff's cause of action should lie in Singapore and not in Malaysia. The plaintiff should proceed to Singapore and obtain the declarations as per prayers (a), (b) and (c) in the Singapore Courts and not here in the Malaysian Courts. The general civil jurisdictions of Malaysian Courts are clearly set out in s. 23 of the Courts of Judicature Act 1964, which enacts as follows:

> 23(1) Subject to the limitations contained in Article 128 of the Constitution the High Court shall have jurisdiction to try all civil proceedings where:
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> (a) the cause of action arose, or
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> (b) the defendant or one of several defendants resides or has his place of business, or
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> (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
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> (d) any land the ownership of which is disputed is situated,
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> within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High Court.
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> (2) Without prejudice to the generality of subsection (1), the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

It is beyond peradventure that this Court has no jurisdiction to adjudicate on matters pertaining to the Constitution of the Republic of Singapore and the Singapore Enlistment Act (Chapter 93), Revised Edition 1992, which the plaintiff wants this Court to do. Briefly put, the declarations sought for (prayers (a) and (c)) are that the plaintiff be declared a Malaysian citizen and, consequently, not bound to register in the Singapore army as a national service recruit. In so far as the first part of the declaration that was sought for, it is the defendant's case that there is no necessity for such a declaration as the plaintiff is already a full-fledged Malaysian citizen. As the second declaration involves a foreign country, the cause of action arose in that foreign country and not in Malaysia and, consequently, the Malaysian Courts have no jurisdiction to adjudicate.

I have asked myself whether the plaintiff's rights, either at law or by statute, have been adversely affected or prejudiced by the acts of the defendant. On the available evidence, I cannot find any material to suggest that. The defendant did not do anything to the plaintiff as to affect the plaintiff's rights in any way whatsoever. The plaintiff has an axe to grind against the Republic of Singapore and not against the Malaysian Government. Applying *Attorney*

General Duchy of Lancaster v. L. & N.W. Railway Co. (*supra*) as adopted and applied in *Lim Kit Siang v. Pemangku Ketua Polis Daerah, Butterworth & Ors.* (*supra*) and in *Government of Malaysia v. Lim Kit Siang* (*supra*), the summary procedure adopted by the defendant to strike out encls. 11 and 3 must surely succeed as they are, on the fact of it, "obviously unsustainable". Lord Diplock LJ in *Pegang Mining Co. Ltd. v. Chong Sam & Ors.* [1969] 2 MLJ 52 in dealing with an application for leave to intervene laid down a lucid test which should also be applicable in an application under O. 18 r. 19 of RHC and the test was worded thus: "Will his rights against or liabilities to any party to the action in respect of the subject-matter of the action be directly affected by any order which may be made in the action?" Translating that test to the facts of the present case, one may ask: Whether the decision of this Court would adversely affect the defendant? In so far as prayer (a) is concerned, it is crystal clear that the plaintiff comes to this Court to seek a declaration of something which he has already obtained. If this Court declares that the plaintiff is a Malaysian citizen such declaration would not adversely affect the defendant as the defendant has made his stand known to the world at large in that the plaintiff is in fact a Malaysian citizen. In regard to prayers (b) and (c), this Court has no jurisdiction to make those declarations sought for as it involved another sovereign nation - the Republic of Singapore. This Court cannot use its power to force the defendant to do something which the defendant in the first place did not do to the plaintiff. Put differently, the defendant did not do anything towards the plaintiff as to affect the plaintiff's rights, either at law or by statute. On perusal of the available evidence, there is absolutely no evidence to show the existence of a "factual situation" as highlighted by Lord Diplock in *Letang v. Cooper* (*supra*). It is a known fact now that the defendant did not deprive the plaintiff of his Malaysian citizenship nor did the defendant threaten to deprive the plaintiff of his rights and privileges as a Malaysian citizen. It is not disputed that the plaintiff is free to move within Malaysia as well as outside Malaysia. It is my judgment that there is no cause of action available to the plaintiff and, consequently, the defendant's application to strike out the originating summons should be granted forthwith.

However, lest I be accused of an oversight, I have not forgotten O. 15 r. 16 of the RHC which states that:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

An action for a declaration has been given considerable prominence in a number of cases. An action in the nature of a declaration may be begun by writ or by originating summons like the present case. In *Punton v. Ministry of Pensions And National Insurance* [1963] 1 WLR 186 especially at p. 191, Lord Denning MR succinctly said:

> Two test cases by Eric Edward Punton and James Charles Croxford were taken to the insurance commissioner. He gave a considered opinion on 20 September 1951, in writing, determining the cases against each of them. He determined the facts and set them out and then he gave his view of the interpretation of the statute. His order was what is called a 'speaking order' and there is no doubt whatever that it could have been reviewed by the High Court by means of a writ of *certiorari* to see whether it was correct in point of law or not. But the applicants did not follow that procedure. Each of them took out an originating summons in the Queen's Bench Division asking for a declaration. That is a procedure which is now available to overcome many of the difficulties surrounding *certiorari*.

In another part of the judgment in the same case, Lord Denning MR, in the same vein, had this to say (p. 192):

> Now, when the case is put that way, it seems to me to be a very proper matter for determination by originating summons for a declaration. Indeed, it is a sensible and modern way of approach. When an originating summons is framed so as to raise a distinct and important point of law, there is not the slightest possible ground for saying that it is frivolous and vexatious. Mr. Cumming-Bruce acknowledged as much in his opening remarks when he said that he did not challenge that the High Court has jurisdiction to make a declaration that the determination of the Commissioner was bad in law.
>
> But the summons is not at present properly framed for the purpose: and when this was pointed out, Mr. Gardiner made an application to amend, to which we were ready to accede. The summons should be amended so as to ask, in effect, for a declaration whether, on the facts found by the Commissioner, he came to a correct determination in point of law. On that amendment being made, the jurisdiction of the Court will be clear.

In my judgment, the procedure adopted by the plaintiff in seeking a declaration before this Court is beyond reproach. It was grounded on the same format as adverted to by Lord Denning MR in the *Punton*'s case (*supra*). Mr. K. Sila Dass, the learned Counsel for the plaintiff, pointed out that as a procedural devise, the action for declaration has grown by leaps and bounds. It is a procedural devise that has been adopted to ascertain and determine the rights of parties or for the determination of a point of law. In so submitting, Mr. K. Sila Dass cited an array of authorities, namely: *Barnard & Ors. v. National Dock Labour Board & Ors.* [1953] 2 QB 18; *Francis v. Yiewsley and West Drayton Urban District Council* [1957] 2 QB 136; *Vine v. National Dock Labour Board* [1957] AC 488; and *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government & Ors.* [1960] AC 260.

Singleton LJ in *Barnard*'s case (*supra*) at p. 35 had this to say on declaration:

> It is submitted on behalf of the National Dock Labour Board that in the order of 1947 there is a complete code on matters of discipline, and that the only way in which decisions can be questioned is by writ of *certiorari*. There is great force

in this submission, and there is a body of authority to support it. It cannot be right to say that whenever a tribunal such as the local board or the appeal tribunal makes a mistake the Court can grant a declaration such as is asked for in the present case; that would lead to endless confusion. The Courts have, however, power to grant a declaration or an injunction in certain cases to prevent an injustice.

At p. 38 of the same case, Singleton LJ sounded a warning:

I am more concerned whether that relief should be granted. It is a matter for the discretion of the Court, and that discretion should be exercised sparingly.

At p. 46 of the same case, Romer LJ was more adamant:

On Mr. Paull's preliminary point, all I wish to say is this, that *prima facie* it is the right of everyone in this country who is involved in a legal dispute to have that dispute determined by Her Majesty's Courts. That right can be taken away; sometimes it can be taken away by contract, subject to certain safeguards, and it certainly may be taken away by statute; but except to the extent to which it is taken away (and here we are only concerned with parliamentary intervention) then *prima facie* that right remains.

In *Francis v. Yiewsly and West Drayton Urban District Council* (*supra*), McNair J at p. 147 said:

It is said that on such a prosecution it would not have been open to the plaintiff to take the point now taken that the enforcement notice was invalid, on which it is argued that that being the remedy provided for by the statute, this Court in the exercise of a discretionary remedy by way of declaration could not assist the plaintiff.

Argument on this branch of the case was based on *Perrins v. Perrins* [1951] 2 KB 414, and the passages in the judgment of Lord Goddard CJ giving the leading judgment in the Divisional Court where, as in the hypothesis stated, the owner took no steps to challenge the enforcement notice, but waited until he was prosecuted under s. 24 before taking the point, and it was held that it was then too late for him to take the point. Lord Goddard CJ said:

> Whether the corporation were right or wrong in the view which they took here, it seems to me that the Act provides that if a planning authority choose to serve an enforcement notice, and that notice is not challenged within 28 days, it becomes effective, and there is the end of the matter.

But, when it is borne in mind that the Court in that case was dealing only with the question whether a Court of summary jurisdiction were right or wrong in refusing to convict, that judgment must be read subject to the limitation that it was only dealing with defences open to the owner in the Court of Summary jurisdiction. That seems to me to be quite a different question from that which is posed to me here. It is a fundamental rule that if a subject is to be deprived of a right of coming to these Courts it must be in clear words. The indications in this statute are to the contrary effect.

In *Vine v. National Dock Labour Board* (*supra*), Viscount Kilmuir LC at p. 499 spoke of declaration in this way:

> I now turn to the striking out of the declaration made by Ormerod J. The granting of a declaration is a matter of discretion, and, in view of the opinions expressed by the majority of the Court of Appeal, I have considered what was said on this subject in your Lordships' House in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.* [1921] 2 AC 438. In that case Lord Finlay said, in the course of his dissenting opinion: 'The question in what cases the jurisdiction to give a declaratory judgment should be exercised has been considered in a number of cases which were called to our attention by Mr. Hogg.' Lord Finlay then cited the expressions used in those earlier cases: 'sparingly,' 'with great care and jealously,' 'with extreme caution.' I agree that the discretion should not be exercised save for good reason. On the other hand, I find helpful the Scottish tests set out in that case by Lord Dunedin, who said:
>
> > The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say someone presently existing who has a true interest to oppose the declaration sought. It seems to me that, however 'cautiously' or 'sparingly' the discretion is to be exercised, this is a case in which the Judge was right to grant a declaration.

In *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* (*supra*), Viscount Simonds in cautious terms had this to say (at p. 287):

> It was urged that, even if the Court had jurisdiction to make the declaration claimed, it was a discretionary jurisdiction which should not be exercised in this case. My Lords, this plea should not, in my opinion, prevail. It is surely proper that in a case like this involving, as many days of argument showed, difficult questions of construction of Acts of Parliament, a Court of law should declare what are the rights of the subject who claims to have them determined. I do not dissent from the contention of the respondents that, where the administrative or the quasi judicial powers of the Minister are concerned, declaratory judgments should not readily be given by the Court. But here, if ever, was a case where the jurisdiction could properly be invoked. It might even be thought surprising that the Minister should not be glad to have such questions authoritatively determined.

Now, it is pertinent to point out that the cases cited by Mr. K. Sila Dass as adverted to above, were based on an entirely different set of facts. On the facts, those cases no where came close to the facts of the present case. But the general principles that can be extracted from those cases are still germane and could be applied. In *Barnard*'s case (*supra*), the Court of Appeal there had to construe the Dock Workers (Regulation of Employment) Order 1947 where the port manager suspended the plaintiffs, registered dock workers, from work and pay. The plaintiffs appealed to the appeal tribunal set up under the order, but their appeals were dismissed. In the case of *Francis* (*supra*), the Court there dealt with an action by the owner who sought for a declaration

that the enforcement notice was ineffective on the ground that planning permission as required by the Town and Country Planning Act 1947 had been granted and because the notice did not specify the development alleged to have been carried out as required by s. 23(2) of the same Act. In *Vine*'s case (*supra*), the House of Lords dealt with the proceedings against the defendants there for damages for wrongful dismissal and a declaration that the plaintiff's purported dismissal was illegal, *ultra vires* and void. In *Pyx Granite Co. Ltd.* (*supra*), the House of Lords had to consider whether the jurisdiction of the Court to grant declarations had been ousted by statute. In these cases, the plaintiffs there had been adversely affected or prejudiced by the acts of the defendants. In our present case, the defendant is an innocent party. The defendant did not do anything as to adversely affect or prejudice the plaintiff.

Mr. K. Sila Dass submitted that although the defendant conceded that the plaintiff is a Malaysian citizen yet there are clear provisions to show what the rights, duties, obligations and liabilities of Malaysian citizens generally and, towards this end, it was submitted that the defendant had for reasons only known to them been unequivocal in deciding what would be the position of a Malaysian citizen, like the plaintiff, who, by birth had acquired the Singapore citizenship status through his mother, and who is called upon to do national service in Singapore, which, if he does would result in a conduct inconsistent with the oath he had taken, namely to be loyal to Malaysia. Mr. K. Sila Dass further submitted that prayers (b) and (c) of encls. 11 and 3 sought to determine the rights, obligations, duties and allegiance of the plaintiff and that this Court has the necessary power to make declarations to that effect. He says that these proceedings would not have been necessary had the defendant made an unequivocal stand on the questions raised, namely, prayers (b) and (c). Consequently, he says that it becomes necessary for the plaintiff to seek the remedy of this Court in order to determine a question of national importance: Whether as a Malaysian citizen the plaintiff could enlist himself for national service in the Republic of Singapore pursuant to the laws of that country and consequently be treated as a disloyal citizen of Malaysia? It is the submissions of Mr. K. Sila Dass that the questions raised in these proceedings are constitutional issues and are not hypothetical or academical questions. A parallel was sought with the case of *Gibson v. Union of Shop, Distributive and Allied Workers* [1968] 1 WLR 1187, where the facts were that on 10 January 1966, the branch committee of the South West London branch of the defendant union, in exercise of its disciplinary powers, purported to expel the plaintiff from the union and passed a resolution to that effect. His appeal to the executive council of the union was allowed to the extent that the executive council substituted for the sentence of expulsion, suspension from office in the branch and from acting in any representative capacity on behalf of the union for a period of two years from 13 March 1966. An appeal against that decision was disallowed. The plaintiff claimed that the decision of the branch committee and both of the decisions of the executive council were *ultra vires* and void.

He also sought an injunction restraining the defendants from acting on them. The two year period of the suspension would come to an end three weeks from the date on which the trial opened: and the preliminary point was taken by the defendants (i) that no useful purpose could be served by trying the action because the only primary relief which was sought was declaratory relief and; because the end of the period of suspension was only three weeks away, no practical results would follow from declaring the suspension invalid; (ii) that consequently the case was not one in which the Court ought to make a declaration or grant any such injunction as had been claimed. Buckley J in the course of his illuminating judgment had this to say:

> I have been referred to a number of authorities but I do not think it is necessary for me to go through them for the problem turns upon the question how the Court ought to exercise its discretionary power of granting declaratory relief. I can easily understand why, if a plaintiff starts an action seeking declaratory relief in respect of some question of such a kind that no legal results will flow from the declaration which he seeks, the Court will be disinclined to entertain his action and to grant any relief in it and that the action would be dismissed as being one the trial of which would serve no useful purpose: but if when the action is instituted the plaintiff has, or may have a good ground of complaint, not of an academic character but involving substantial legal issues, it seems hard that he should be faced when the case comes on for trial with the suggestion that his case ought not to be tried because, owing to the lapse of time between the date when he issued the writ and the time when having regard to the business of the Court and the necessary preparatory steps, the action comes on for trial, the relief which he seeks has become much less important or perhaps has even ceased to have any practical implications at all.
>
> In the present case, even today I do not think it could be said that the question raised in this action is strictly an academic one, for the period of suspension, although it has only a short time to run, is still current and there are three weeks during which, if the decision of the executive council is allowed to stand, the plaintiff will be inhibited by that decision from doing things which otherwise it is possible that he might have been able to do in his capacity as a member of the union. I will say at once that Counsel for the defendants says he cannot see that any such occasion will arise within the next three weeks and Counsel for the plaintiff agrees that so far as he can foresee at the present time nothing is likely to occur within the next three weeks in respect of which the plaintiff would be in any way affected by the suspension. Nevertheless, the issue between the parties is not in this case a purely and exclusively academic one. Moreover, the powers that are here said to have been improperly exercised by the defendant union are disciplinary powers and the question whether they were rightly or wrongly exercised, I think, may well have repercussions which are not in the nature of legal results flowing from the actual disciplinary action, but repercussions which might affect the plaintiff in his union in the future; if, for instance, he desired to seek office in the future in the union. I think it would be a hardship on him if he were not now entitled to have the issues which he seeks

> to raise in the action tried, notwithstanding that the only relief which he seeks is of a declaratory nature supported by a claim for an injunction which can only operate, if it is granted at all, until the 13th of next month.

It was argued, applying *Gibson*'s case (*supra*), that legal results will flow from the declarations which the plaintiff seeks and this Court should be inclined to entertain his application. At first blush the argument appears attractive but on closer scrutiny the facts in *Gibson*'s case (*supra*) are poles apart from the present case. *Gibson*'s case (*supra*) concerned the disciplinary powers that have been improperly exercised by the defendant union and Buckley J was concerned with the repercussions which might affect the plaintiff there in that union in the near future. It was solely for this reason that Buckley J dismissed the preliminary point and ordered the action to proceed to trial. In the present case, for fear of repetition, the defendant did not do anything to put the plaintiff in the predicament in which he is placed. That predicament was self induced by the plaintiff himself and he has only himself to blame for that. The plaintiff's remedy lies in the Republic of Singapore, to be precise in the Courts there and not in this Court.

Next, it was submitted that the plaintiff's recourse to Her Majesty's Courts for the determination of his rights should not be whittled down nor excluded except by clear words. Reliance was placed on *Barnard*'s case (*supra*) especially the judgment of Romer LJ as quoted in the early part of this judgment. I entirely agree with the views as expressed by Romer LJ in that case. Every citizen in this country has an inherent right to refer a legal dispute to this Court for determination. That is "a fundamental rule" that can only be excluded by clear words (per McNair J in the case of *Francis* (*supra*)). Viscount Simonds in *Pyx Grantie Co. Ltd.* (*supra*) was of the same view and this is clearly reflected at p. 286 where his Lordship succinctly said:

> There is nothing in the Act (referring to the Town and Country planning Act 1947) to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and, as we like to call it, the inalienable remedy of Her Majesty's subjects to seek redress in her Courts is taken away.

In certain cases, in order to prevent an injustice, the Courts have the power to grant a declaration (per Singleton LJ in the *Barnard*'s case (*supra*)). Grounded on these authorities, it was strenuously argued that this Court should grant the prayers sought for, namely, prayers (a), (b) and (c). It is however, not as simple as it is made out to be. Certain observations need to be highlighted. Firstly, a declaration would not be issued in all cases. Secondly, it must not be forgotten that even though this Court is empowered to make a declaration, the crucial question to ask is this: Would this Court, on the facts and circumstances of the present case, be inclined to make the declarations sought for ? Thirdly, the declarations especially prayers (b) and (c) relate to the interpretation of the Constitution of the Republic of Singapore and the Singapore Enlistment Act (Chapter 93), 1992 Edition. Fourthly, it would be a

grave injustice to the defendant if the declarations sought for in prayers (b) and (c) were ordered by this Court. Fifthly, the jurisdiction of this Court to make a declaratory relief is discretionary in nature.

Dyson v. Attorney-General [1912] 1 Ch. 158 adds to the list of authorities where a declaratory order was made. Cozens Hardy MR in the final part of his judgment at p. 166 of that case had this to say:

> In my judgment on the interlocutory appeal, to which I adhere, I pointed out that the jurisdiction to make a declaratory order is discretionary. And it has been urged by the Attorney-General that in our discretion no order ought to be made. I am bound to say that, assuming the jurisdiction to exist, I cannot imagine a more proper case for its exercise. It is no light matter for the Commissioners to issue broadcast forms which purport to impose obligations which do not exist and which add a threat of a penalty in case of noncompliance. A general declaration is pre-eminently desirable in these circumstances. And I am a little surprised that the Commissioners do not welcome a decision which will guide their action in the future. Their contention that no Court should interfere unless and until a penalty is sued for seems extravagant.

Fletcher Moulton LJ in the *Dyson*'s case (*supra*) in the same vein said at p. 168:

> So far from thinking that this action is open to objection on that score, I think that an action thus framed is the most convenient method of enabling the subject to test the justifiability of proceedings on the part of permanent officials purporting to act under statutory provisions. Such questions are growing more and more important, and I can think of no more suitable or adequate procedure for challenging the legality of such proceedings. It would be intolerable that millions of the public should have to choose between giving information to the Commissioners which they have no right to demand and incurring a severe penalty. There must be some way in which the validity of the threats of the Commissioners can be tested by those who are subjected to them before they can render themselves liable to penalty, and I can conceive of no more convenient mode of doing so than by such an action as this.

It is pertinent to point out that *Dyson*'s case (*supra*) which decided the questions relating to the form of action and the jurisdiction to make a declaratory order against the Attorney-General as representing the crown was followed by *Burghes v. Attorney-General* [1912] 1 Ch. 173. Mr. K. Sila Dass mounted his arguments on these two authorities and urged this Court to determine the rights and duties of the plaintiff and whether the breach of such duties in the plaintiff's capacity as a Malaysian citizen would expose him to irreversible consequences and, if so, what should the plaintiff do to avert such consequences or, so submitted Mr. K. Sila Dass, what should the defendant do to alleviate the predicament of the plaintiff. It was submitted that the plaintiff was seeking a relief against an interference of his right not to perform national service in the Republic of Singapore and the attendant threat by the Singapore

Government to punish the plaintiff for evading national service there, and these interference and threat were said to be elements which the defendant was under a duty to alleviate by making a decisive stand and advise the plaintiff what lays ahead for him if he involuntarily submits to the demands of the Singapore Government. It was submitted that if the defendant makes it plain that as a Malaysian citizen should the plaintiff do national service in the Republic of Singapore, he shall be attended with serious consequences then, it was submitted, it would not be necessary to bring this action. It is quite obvious that the plaintiff is most unhappy with the letter from the Ministry of Home Affairs, Malaysia dated 22 June 1993 which was addressed to the plaintiff's solicitors as per Exh. "TKSK9". That letter was worded thus:

> Tuan,
>
> **Penolakan Taraf Kerakyatan Singapura Oleh Encik Tan Keat Seng**
>
> Adalah Saya diarah merujuk surat tuan bertarikh 21 April 1993 mengenai perkara di atas.
>
> 2. Merujuk perenggan dua surat tuan menyebut bahawa ibu serta kedua-dua anak kepada anakguam tuan adalah pemastautin tetap negara ini. Jika sekiranya mereka adalah warganegara Singapura maka mereka masih tertakluk di bawah undang-undang negara itu.
>
> 3. Mengenai peruntukan di bawah Perkara 15 (3) Perlembagaan adalah berkaitan perolehan kewarganegaraan dengan cara daftaran bagi mereka yang berumur di bawah 21 tahun dan lahir sebelum bulan Oktober 1962. Syarat-syrat yang di tentukan di dalam peruntukan ini tidak boleh dikaitkan dengan anak guaman tuan kerana kelahirannya adalah pada tahun 1974.
>
> Sekian, di maklumkan, Terima Kasih.
>
> Berkhidmat Untuk Negara
>
> Wawasan Memajukan Ummah
>
> Saya yang menurut perintah,
>
> sgd.
> (Md. Zin bin Abd. Hamid)
> Unit Pendaftaran Negara,
> Bahagian 'B',
> b.p. Ketua Setiausaha,
> Kementerian Dalam Negeri.

It was submitted by Mr. K. Sila Dass that the defendant cannot be heard to say that simply because this is a matter which involves a foreign government the plaintiff has to deal with it in that foreign country. By so doing, it was next submitted that the defendant is abdicating from its responsibilities by not showing clear signals that it is an act of disloyalty to do national service in a foreign country, because national service itself involves pledging loyalty to that

country. It was contended that if the plaintiff were to submit to the Singapore Government's demand, then, it follows that the plaintiff would have committed a wrongful act against Malaysia. It was said that by historical accident the plaintiff has a father who is a Malaysian citizen and a mother who is a Singapore citizen. The plaintiff was born in Singapore. The Singapore law says he is a Singapore citizen and the Malaysian law says he is a Malaysian citizen by operation of law.

As a child, it was said that the plaintiff had to follow his father's domicil, which he did. The Singapore Government says that, pursuant to their laws, the plaintiff is required to do compulsory national service. The plaintiff says that this interferes with his rights and obligations as a Malaysian citizen. It was submitted that in view of the complexity of the case, the plaintiff is seeking a declaration from this Court to protect his rights under the Federal Constitution. This was done simply to ensure that he is not subject to any form of compulsion whereby he would be deprived of his Malaysian citizenship. That is said to be the danger the plaintiff is facing and surely it could be labelled as a justifiable issue sufficient to set aside the application under O. 18 r. 19 of the RHC. Reliance was placed on the case of *Guaranty Trust Co. of New York v. Hannay & Co.* [1914-15] All ER Rep. 24 CA where the headnote reads as follows:

> RSC, O. 25 r. 5, which provides: "No action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed, or not," is not invalid as being *ultra vires* the Rules Committee. The rule confers on the Court a general power to make a declaration in favour of a party although that party has no cause of action apart from the rule, provided that he is interested in the subject-matter of the declaration. The power is not limited to making a declaration at the instance of a person claiming a right and intending to assert it if it should become necessary. A declaration that a person is not liable in an existing or possible action is one that will hardly ever be made. In practically every case the person asking for it will be left to make his defence in the action when it is brought, but it is not beyond the power of the Court in a very exceptional case to make such a declaration. Having regard to general business convenience and the importance of adapting the machinery of the Courts to the needs of the suitors, the rule should receive a liberal a construction as possible.

The facts of that case were that the defendants were cotton dealers carrying on business in Liverpool, and in the years 1909 and 1910 they made purchases of cotton from a firm in the United States. The course of business with regard to such transactions was for the sellers upon shipment of the cotton to draw a bill of exchange for the price of the cotton, to affix thereto the bills of lading and insurance certificate, and to transmit the documents to the defendants so that they might accept the bill of exchange and pay the amount thereof. A number of bills of exchange so accepted were purchased in good faith by the

plaintiffs, a company carrying on business in New York and having a branch in London, and were presented by them with the accompanying documents to the defendants, who accepted and paid the same. It subsequently appeared that the bills of lading attached were forgeries, being for cotton which never had any existence and which had never been shipped. In January 1911, the defendants commenced an action against the plaintiffs in the United States, claiming repayment of the amount of the bills of exchange, their claim being based on grounds depending mainly upon English Law, and they recovered judgment. The plaintiffs appealed, and a new trial was ordered. The plaintiffs then brought the present action in England, claiming declarations that they had not, by presenting the bills for acceptance with the bills of lading attached, warranted or represented that the bills of lading were genuine, but that all the bills of exchange had been accepted by the defendants unconditionally, so that they were not bound to repay the amounts of the bills. Upon an application by the defendants to strike out, under RSC, O. 25 r. 4, the claim for the declaration on the ground that they disclosed on cause of action, Bailhache J, in giving judgment, said:

> The practice in the Commercial Court has been to make declarations when they serve some real practical purpose, such, for instance, as guiding parties in their future conduct in relation to commercial contracts, and with a view rather to avoid litigation than in aid of it. I am not prepared to hold that declarations can only be made at the instance of the party for the purposes of an action in which he proposes to be plaintiff. Bucknill J, in the circumstances not distinguishable in principle from those of the present case, made such a declaration as I am asked to make in *The Manar* [1903] p. 95, 89 LT 26, and, in my judgment, it is open to the Courts to entertain the plaintiff's action if they see fit. The power is discretionary, but I think it exists. The next question is: Ought it to be exercised in this case? The advantages of the course taken by the plaintiffs are obvious. There will be a decision of the English Court upon the precise point instead of the conflicting opinions of English lawyers. Of course, the decision will not be binding upon the American Courts, but it will afford them the best procurable evidence, and I see no reason to doubt that they will welcome the assistance which such a decision would give. I shall follow the decision of *The Manar* and entertain the action.

Accordingly, he dismissed the application, and the defendants appealed. The appeal was heard by Pickford and Bankers LJJ, with Buckley LJ dissenting. Pickford LJ expressed his views in this way:

> There only remains to be considered the circumstances of this particular case. It has been ascertained in the course of the case that the rights of the parties depend upon a question of English law, and, in my opinion, the whole object of this action is either directly by means of an injunction, or indirectly by means of a claim for a declaration, to compel the defendants to litigate the question in England, and not in the United States of America. If this cannot be done, it will very probably be the case that if this declaration were made it would be used to guide the Court in the United States to the determination of the point of law,

but the real intention is to make it not worth the defendant's while to go on with the action there. It may very well be that it is more convenient to decide the question here, and I regret that the suggestion of Buckley LJ, was not accepted, but the defendants are entitled to bring their action in the United States, and can only be prevented from doing so on the principles laid down in *Logan v. Bank of Scotland* [1906] 1 KB 141. This procedure is open to the plaintiffs, and, if they fail to establish their right in that way, I do not think they should be allowed to obtain it indirectly by this declaration. But the question is whether that goes to the power to make the declaration. I think that a declaration that a person is not liable in an existing or possible action is one that will hardly even be made, but that in practically every case the person asking for it will be left to get up his defence in the action when it is brought: (see per the Master of the Rolls in *Dyson v. A.G.* [1911] 1 KB at p. 417) and per Joyce J, in *North Eastern Marine Engineering Co. v. Leeds Forge Co.* [1906] 1 Ch. at pp. 329, 330), but taking the large view that I do of the effect of O. 25 r. 5. I am not prepared to say that it is beyond the power of the Court in a very exceptional case to make such a declaration, and that the fact of its being asked for a purpose which the Court does not approve does not take away the power to make it, but only gives reason to refuse it. I think therefore, that there is jurisdiction to make this declaration, but as I understand the circumstances now it ought not to be made. In my opinion, the appeal should be dismissed on the ground that this is not a proper case for the summary procedure under O. 25 r. 4, and, on the other questions on which our opinion has been asked, I think the Court has power to make the declaration, but on the facts at present before me I think it ought not to be made. I think the action should be allowed to proceed to trial, when all the facts can be ascertained and a proper decision arrived at which cannot, in my opinion, be done in the present proceeding. I understand that the question whether, as a matter of discretion, the order should be made was not really argued in the Court below. I think, therefore, that the appeal should be dismissed, the order of the learned Judge making the costs of the application costs in the cause should stand, and the costs of this appeal showed also be costs in the cause.

Though the case of *Guaranty Trust Co. of New York v. Hannay & Co.* (*supra*) construed the English O. 25 r. 5 of the RSC which is identical with the Malaysian O. 15 r. 16 of the RHC yet the facts there are poles apart from our present case. Here like there the crucial question to ask is this : Ought the discretion to grant the declarations sought for be exercised in favour of the plaintiff? Perhaps it is ideal to tabulate the facts in this manner:

(1) the plaintiff was born in Singapore on 17 December 1974. The assertion in Exh. "TKSK6" that, *inter alia*, the plaintiff by birth a citizen of Malaysia was an attempt by the plaintiff's solicitors to twist the facts in favour of the plaintiff.

(2) The plaintiff became a Singapore citizen;

(3) The plaintiff was issued with a Singapore Restricted Passport No: S7441659D and held a Singapore identity card. To be accorded these privileges the plaintiff must have resided in Singapore and the Singapore

address must be at no. 331, Upper Paya Lebar Road, Singapore 1953 which also happens to be the address of the plaintiffs mother (see Exh. "TKSK10"). Thus, when the plaintiff deposed in the affidavit that his brother, sister and himself had lived in Johor Bahru although they attended schools in Singapore, it runs counter to logic and commonsense. Why must the plaintiff live in Johor Bahru when his mother has a house in Singapore and when he himself was, at the material time, a Singaporean ?

(4) The plaintiff's mother is still a Singapore citizen while his father is a Malaysian citizen.

(5) The plaintiff had his early education in Singapore where the medium of instruction is in the English language and he must have benefitted under that education system because he is said to be currently in the United Kingdom pursuing his studies. It is common knowledge that foreigners studying in the Republic of Singapore are required to pay a levy and I can take judicial notice of this state of affairs (*Union Insurance Malaysia Sdn. Bhd. v. Chan You Young (f)* CLJ JT (28) 1995; [1995] 3 AMR: 2896; [1995] 4 CLJ 92). The plaintiff as a Singapore citizen, at that point of time, must have enjoyed all the rights and privileges of being a Singaporean as far as his education was concerned.

(6) It was said that when the plaintiff was 15 years of age (this must have been on 17 December 1989) his mother approached the Citizenship Department of Singapore to convey the message that the plaintiff was desirous of renouncing his Singapore citizenship. His mother was told that this could only be done when the plaintiff reached the age of 18 years old (as the law of Singapore stood at that point of time). But unfortunately, there was no documentary evidence to support the plaintiff's assertion that his mother went to the Citizenship Department of Singapore when the plaintiff was 15 years of age.

(7) There was no mention at all in the plaintiff's affidavit as to when the plaintiff acquired his Malaysian citizenship status. The letter dated 21 April 1993 as per Exh. "TKSK7" of the last paragraph of p. 1 bore a sentence to show that even on that date (21 April 1993) the plaintiff's status as a Malaysian citizen was still in its infant stage. That sentence reads as follows:

> Pandangan kami adalah walaupun Kitson (referring to the plaintiff) di lahirkan di Singapura, beliau **telah memohom kewarganegaraan Malaysia** menurut daerah jajahan bapanya, anakguam kami. Artikel 15 Fasal 3 perlembagaan Malaysia adalah relevan di sini yang mana sesalinan dilampirkan. Berikutan dengan ini Kitson adalah seorang warganegara Malaysia yang sebenarnya.

Curiously, Article 15(3) of the Federal Constitution relates to the acquisition of Malaysian citizenship by registration of those below the age of 21 and born before the beginning of October 1962. As the plaintiff was born on 17 December 1974, he cannot therefore come under Article 15(3) of the Federal Constitution. This is an instance of misrepresentation of the law and that was a misrepresentation to the Malaysian Minister of Home Affairs. By letter dated 28 January 1994 (Exh. "TKSK3"), the plaintiff's Singapore passport No. S 74416590 D was returned to the Singapore Immigration Department and an acknowledgement to that effect by letter dated 7 March 1994 (Exh. "TKSK4") was received from the Singapore Immigration Department. I am grateful to Mr. Azman Abdullah, the learned Senior Federal Counsel for the defendant, who at the bar handed to me the Malaysian identity card and the Malaysian passport of the plaintiff. From the Malaysian identity card of the plaintiff under column "tarikh keluar kad" the date 21 January 1990 is clearly written therein while the Malaysian passport of the plaintiff bore the date of the issuance of that passport as 14 September 1992. It is therefore my judgment that the plaintiff acquired his Malaysian identity card on 21 January 1990 just a few days after he turned 15, and this made him a Malaysian citizen.

(8) If the plaintiff's mother had gone to see the officers at the Citizenship Department of Singapore when the plaintiff was 15 years old (on 17 December 1989) as alleged, she must have been informed of the procedure as to how to go about renouncing her son's Singapore citizenship status. Even the letter dated 10 September 1992 (Exh. "TKSK2") from the Registrar of Citizens, Singapore to the plaintiff's solicitors briefly adverted to the plaintiff not having met the age requirement and therefore he was said not to be eligible to renounce his Singapore citizenship. For convenience that letter is reproduced below:

> Dear Sirs,
>
> Remunciation of Singapore Citizenship
>
> Tan Keat Seng Kitson
>
> **NRIC: 7441659D**
>
> Please refer to your letter dated 11 August 1992.
>
> 2. I append below the extract of Articles 128(1) and 128(2) of the Constitution of Republic of Singapore for your perusal:
>
> 128(1) Any citizen of Singapore of or over the age of twenty-one years and of sound mind who is also or is about to become a citizen of another country may renounce his citizenship of Singapore by declaration registered by the government, and shall upon such registration cease to be a citizen of Singapore.

(2) The Government may withhold the registration of a declaration under this Article:

(a) If the declaration is made during any war in which Singapore is engaged; or

(b) If the declaration is made by a person subject to the Enlistment Act unless he has:

(i) discharged his liability for full-time service under s. 12 of that Act;

(ii) rendered at least three years of reserve service under s. 13 of that Act in lieu of such full-time service; or

(iii) complied with such conditions as may be determined by the Government.

3. Since your client has not met the age requirement, he is not eligible to renounce his Singapore citizenship.

Yours faithfully,

(Sgd)

Mrs. Chua-Quek Soo Noi
for Registrar of Citizens
Singapore.

c.c: Commander,
Central Manpower Base.

It is interesting to reproduce s. 10 of the Singapore's Enlistment Act (Chapter 83) Revised Edition 1992. It is as follows:

10(1) Subject to the provisions of this Act, the proper authority may by notice require a person subject to this Act not below the age of 18 years to report for enlistment for national service.

(2) A person required to report for enlistment for national service shall report to the proper authority on such date and at such time and place as may be specified in the notice and shall attend from day to day until duly enlisted.

(3) Enlistment for national service shall be in the manner approved by the proper authority.

(4) No duty of any kind shall be imposed on a person required to report for enlistment or service unless he is found fit for service.

It is my considered view that there is no power to make a declaration on a subject relief in respect of which is beyond the jurisdiction of this Court. I am fortified in my view by the passages appearing in the judgment of Diplock LJ in the case of *Buck & Ors. v. Attorney-General* [1965] 1 All ER 882 CA especially at pp. 886 and 887 where his Lordship said:

> In my view, once this Court is satisfied that Sierra Leone is an independent sovereign state, it has no jurisdiction to deal further with the claims for these declarations. As was pointed out in *Garthwaite v. Garthwaite* [1964] 2 All ER 233 at p. 241:
>
> > In its narrow and strict sense, the 'jurisdiction' or a validly constituted Court connotes the limits which are imposed on its power to hear and determine the issues between persons seeking to avail themselves of its process by reference (i) to the subject matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors.
>
> The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. That is a subject-matter over which the English Courts, in my view, have no jurisdiction.

Bluntly put, and translating *Buck*'s case (*supra*) to the facts of the present case, it is an appropriate statement to say, and it is my judgment, that as the Republic of Singapore is a foreign independent sovereign state, this Court has no jurisdiction over its affairs.

It is also my judgment that the plaintiff decided to leave the Republic of Singapore upon reaching the age of 15 and acquired Malaysian identity card on 21 January 1990 which directly made him a Malaysian citizen to avoid being conscripted for national service in the Republic of Singapore. That was surely an unholy haste on his part to leave the Republic of Singapore. Now, the plaintiff finds himself in a tight spot - self created and self induced and seeks to hide behind the skirt of the Malaysian Government, so to speak, after wearing the skirt of the Republic of Singapore, so to speak, for 15 solid years. The plaintiff seeks this Court's indulgence to interpret Articles 128(1) and 128(2) of the Constitution of the Republic of Singapore and the Singapore's Enlistment Act (Chapter 93) Revised Edn. 1992 by way of a declaratory order. The plaintiff is fearful that his status as a Malaysian citizen would be jeopardised once he serves and completes his national service stint in the Republic of Singapore; he is afraid that that would be a ground for the deprivation of his Malaysian citizenship. Mr. Azman Adbullah for the defendant gave assurances to the effect that the Malaysian Government would not be heartless and that

it did not intend nor desire to withdraw the status of the plaintiff as a Malaysian citizen at any point of time. These assurances reflect the magnanimous gesture of the Malaysian Government - a gesture of a kind not found anywhere in the world. Be that as it may, for the reasons adumbrated above, I refused to make the declarations sought for in encls. 11 and 3 and gave costs to the defendant. I acceded to the defendant's request (encl. 10) to strike out encls. 11 and 3 under O. 18 r. 19 of the RHC with costs.

Reported by Gan Peng Chiang

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